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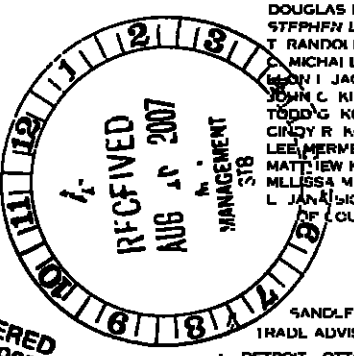
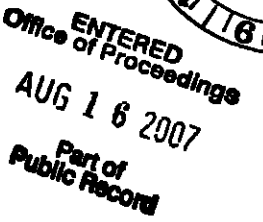
August 15, 2007





Via Federal Express

The Honorable Vernon A Williams
Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: Finance Docket No. 35039, Motion to Expedite Judgment on Horizon Lines, LLC Petition for Declaratory Order

Dear Secretary Williams

Enclosed for filing in the above-referenced proceeding please find an original and ten copies of Horizon Lines LLC's Motion to Expedite Judgment on Petition for Declaratory Order

An additional copy of the filing is enclosed Please indicate receipt and filing by date-stamping the additional copy and returning it in the self-addressed stamped envelope provided

Thank you for your consideration in this matter

Respectfully submitted,

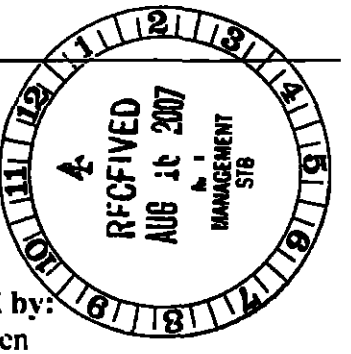
David Cohen
Counsel for Horizon Lines, LLC

BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 35039

Horizon Lines, Motion to Expedite Judgment on Petition for Declaratory Order

Submitted: August 15, 2007



Submitted by:
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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO 35039

HORIZON LINES, LLC
MOTION TO EXPEDITE JUDGMENT ON PETITION FOR DECLARATORY ORDER

INTRODUCTION

On May 22, 2007, Horizon Lines, LLC ("Horizon") petitioned for affirmation of the statutory language of the Jones Act and its application with respect to through routes recognized by the Surface Transportation Board ("STB" or "Board") (copy of Horizon's petition is incorporated into this submission by reference and attached for your reference) There is an immediate need for an expedited decision on Horizon's petition as the annual fishing season continues Further delays are injurious to Horizon, which faces unfair competition from foreign carriers claiming to qualify for the Jones Act exception

In light of the foregoing, Horizon respectfully requests that its petition for the issuance of a Declaratory Order affirming the statutory language of the Jones Act and its application with respect to through routes recognized by the Board be considered on an expedited basis The Jones Act provides limited exceptions to its general prohibition of the transportation of merchandise between points in the continental U S . including Alaska, by foreign carriers Horizon's petition specifically requested the STB to issue a Declaratory Order declaring that the movements described therein do not qualify for a

Jones Act exception because they do not meet the reasonableness standard set forth in *49 U S C § 13701* and are not through routes "recognized" by the Board

BACKGROUND

Horizon is a Jones Act qualified water carrier directly competing with non-Jones Act water carriers operating in the U S noncontiguous domestic trades pursuant to exceptions to the Jones Act Under the Jones Act, (as revised)

> Except as otherwise provided a vessel may not provide any part of the transportation of merchandise by water, or by land and water between points in the United States to which the coastwise laws apply, either directly or via a foreign port, unless the vessel
>
> > (1) is wholly owned by citizens of the United States for purposes of engaging in coastwide trade

46 U S C § 55102(b)

> These Jones Act restrictions do not apply, however, to
>
> the transportation of merchandise between points in the continental United States including Alaska, over through routes in part over Canadian rail lines and connecting water facilities if the routes are recognized by the Surface Transportation Board and rate tariffs for the routes have been filed with the Board

46 U S C §55116 Emphasis added ("Jones Act Exception") Clearly, then, the existence of an STB-recognized through route is an essential qualifier for the statutory Jones Act Exception The STB has no legal authority to waive such requirement

Horizon faces unfair and injurious competition from foreign carriers claiming to qualify for the Jones Act Exception Specifically, Horizon is requesting the STB to declare that the movements at issue are unlawful under the Jones Act Exception because the through routes at issue are (1) unreasonable, contrary to the reasonableness standard set forth in *49 U S C § 13701*, and (2) involve through routes that are not and should not

be recognized by the STB Horizon's request is required by the plain language of the statute and is necessary to protect the domestic shipping industry from unfair practices designed to circumvent the law

Given U S Customs and Border Protection's own admission that they lack the expertise on their staff to conduct an analysis to evaluate the reasonableness on any routing ostensibly to comply with the Third Proviso (see CBP's letter to David E Cohen, Counsel for Horizon dated April 27, 2007 (File No HH009796) (see Attachment 4 – page 2 to Horizon's Petition for Declaratory Order), Horizon urges the STB to evaluate the route at issue in this case and issue a declaratory order that such route is not a recognized through route nor is it a reasonable route under the statutes the STB is charged to interpret and implement

Conclusion

For the reasons stated above, Horizon respectfully requests that the STB expedite its consideration of its Petition for Declaratory Order declaring the movements described above in violation of the Jones Act because they are unreasonable and, therefore, do not occur over a through route that is "recognized" by the Board Should you have questions or require additional information please do not hesitate to contact the undersigned

Respectfully Submitted,

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May 22, 2007

Via Federal Express

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
395 E Street, N.W.
Washington, DC 20423-001

Re: Horizon Lines, LLC Petition for Declaratory Order

Dear Secretary Williams:

On behalf of Horizon Lines, LLC, enclosed for filing are the original and ten copies of a Petition for Declaratory order and a check in the amount of $1,400 for the filing fee. We have also included an additional copy that we request be date-stamped and returned in the enclosed self-addressed envelope.

Should you have questions, please do not hesitate to contact us at (202)216-9307.

Respectfully submitted,

David Coleen
Sandler, Travis & Rosenberg, P.A.
Counsel for Horizon Lines, LLC

BEFORE THE
SURFACE TRANSPORTATION BOARD

Petition for Declaratory Order

Submitted: May 22, 2007

Filed By David Cohen
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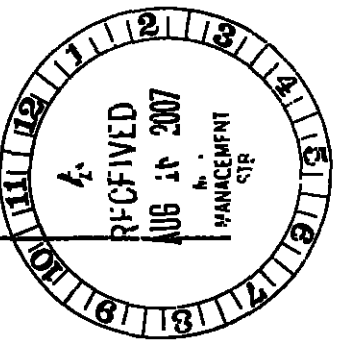
* **Note: Attachment 2 contains color copies.**

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE NO. _____

HORIZON LINES, LLC
PETITION FOR DECLARATORY ORDER



INTRODUCTION

Horizon Lines, LLC ("Horizon") respectfully petitions the Surface Transportation Board ("STB" or "Board") to issue a Declaratory Order affirming the statutory language of the Jones Act and its application with respect to through routes recognized by the Board. The Jones Act provides limited exceptions to its general prohibition of the transportation of merchandise between points in the continental U.S., including Alaska, by foreign carriers. This petition specifically requests the STB to issue a Declaratory Order declaring that the movements described herein do not qualify for a Jones Act exception because they do not meet the reasonable standard set forth in *49 U.S.C. § 13701* and are not through routes "recognized" by the Board.

BACKGROUND

Horizon is a Jones Act qualified water carrier directly competing with non-Jones Act water carriers operating in the U.S. noncontiguous domestic trades pursuant to exceptions to the Jones Act. Under the Jones Act, (as revised pursuant to Pub. L. 109-304, 120 STAT. 163 (codified as amended in sections in 46 U.S.C.)

> Except as otherwise provided a vessel may not provide any part of the transportation of merchandise by water, or by land and water between points in the United States to which the coastwise laws apply either directly or via a foreign port, unless the vessel
>
> > (1) is wholly owned by citizens of the United States for purposes of engaging in coastwise trade

See 46 U.S.C. § 55102(b)

> The Jones Act does not apply, however, to
>
> the transportation of merchandise between points in the continental United States including Alaska, over through routes in part over Canadian rail lines and connecting water facilities if the routes are recognized by the Surface Transportation Board and rate tariffs for the routes have been filed with the Board

46 U.S.C. §55116 Emphasis added ("Jones Act Exception")

Horizon faces unfair and injurious competition from foreign carriers claiming to qualify for the Jones Act exception despite the fact that they neither file rate tariffs nor travel over through routes recognized by the STB as required by statute Attempting to curtail these unlawful practices, Horizon filed a ruling request with U.S. Customs and Border Protection ("CBP") requesting that CBP prohibit movement failing to meet the strict requirements set forth in the statute (*i.e.* that rate tariffs are filed and the through route is recognized by the STB)

The movement that was the subject of that ruling request, as well as this petition for a Declaratory Order, is as follows

> Sunmar will charter foreign-flag, non-coastwise-qualified vessels from foreign owners (the "Vessels"). The products loaded onto the Vessels in the Dutch Harbor area will be antized for intermodal carriage and handling under the through bill of lading. The vessels will then move the cargo from Dutch Harbor to New Brunswick, Canada.
>
> When the Vessels arrive in New Brunswick, Canada, the product will be discharged to the Bayside Food Terminal near Bayside, New Brunswick [located near the town of St. Andrews south of Calais, Maine] where they will be staged for intermodal carriage. At the Bayside terminal the products will be transferred into intermodal reefer trailers. The loaded trailers will be hauled by truck to either McAdam, New Brunswick or Saint John, New Brunswick, where the trailers will be loaded onto rail flat cars.
>
> The rail cars will then be moved by the NBS Railway over rail trackage in Canada, either from McAdam to Saint John, or Saint John to McAdam. At either of these rail-truck transfer facilities, the NBS Railway truck trailers will be offloaded and then driven from there into the United States via the St. Stephen, New Brunswick/Calais, Maine, border crossing. After entry the trailers will be trucked to a cold storage facility in the United States. Sunmar will be documented as the shipper, while each respective customer is the consignee and the Canadian rail carrier will be the NBS Railway.[1]

HRL 11546 (August 9, 1996) ("Sunmar Ruling"). *See* Attachment 1. A map of this movement has been provided for your reference at Attachment 2.

On January 21, 2004, U.S. Customs and Border Protection ("CBP") issued an administrative ruling erroneously indicating that competing foreign-flagged vessels qualify for the Jones Act exception despite failure to comply with the statutory requirement to file a rate tariff with the STB and the fact that the routes under consideration were not recognized by the STB ("Sunmar Ruling"). *Id.* Initially, Horizon

[1] Sunmar and ASC have both stipulated to these facts with respect to litigation before the United States District Court for the District of Columbia.

challenged the *Sunmar Ruling* asking CBP to reconsider this interpretation of the Jones Act. This administrative challenge requested that CBP find the *Sunmar Ruling* in error because (1) no tariff had been filed with the STB so the express requirement of the Jones Act exception was unfulfilled rendering the subject transportation ineligible to be moved between U.S. points on a foreign-flagged vessel and (2) the circuitous route described in the ruling was, in Horizon's opinion, a sham, simply serving as a ruse to establish technical compliance while serving to undermine the protections to domestic shipping that the Jones Act sought to achieve. CBP refused to revise *Sunmar*. *CBP Letter to Sandler, Travis & Rosenberg, P.A. dated January 21, 2004*. *See* Attachment 3.

Horizon then challenged the *Sunmar Ruling* before the United States District Court for the District of Columbia. American Seafoods Company LLC ("ASC") joined the action as a defendant-intervenor. The Court agreed with Horizon, finding that the *Sunmar Ruling* was arbitrary and capricious, and not in accordance with the law. *Horizon Lines, LLC v. United States of America, et al.*, 414 F. Supp. 2d 46, 60 (D.C. Cir. 2006). In its opinion, the Court held that foreign-flagged vessels will only qualify for the Jones Act exception if a tariff is filed with the STB. *Id.* The Court provided no analysis of what constitutes a "through route" or whether such a route is "recognized by the STB."

In apparent response to the Court's findings, ASC filed a tariff with the STB on August 28, 2006 for water/rail transportation and related services southbound between Dutch Harbor, Alaska and Boston, Massachusetts and New Bedford, Massachusetts. Sunmar filed a virtually identical tariff with the STB on November 7, 2007 for water/rail

transportation and related services between the same coastwise points. For reasons explained in detail below, both the Sunmar and ASC tariffs were filed including the same sham routes, devised solely for purposes of qualifying for an exception to the Jones Act and serving no underlying transportation purposes.

On April 27, 2007, CBP sent a letter to Horizon indicating that it was "cognizant of the fact that in *Horizon Lines* the court ruled that a water carrier in the noncontiguous domestic trade had to have a rate tariff filed with the Surface Transportation Board (STB) in order to transport merchandise in a non coastwise-qualified vessel over the waterborne portion of a through route that included Canadian Rail lines." ("April 27th Letter") *See* Attachment 4. As a result, CBP indicated that henceforth it would require water carriers operating in the noncontiguous domestic trade to have a tariff on file with the STB for any through route "in order for the water carrier to lawfully employ a non-coastwise-qualified vessel in transporting merchandise over such route."

DISCUSSION

I. STB has Authority to Evaluate the Jones Act Statutory Language and Decide What Constitutes a "Through Route" and Whether Such a Route is "Recognized by the STB"

A. STB Is the Proper Authority to Address the Issues Addressed by this Petition

The STB is the proper authority to address issues set forth in this petition. On December 29, 1995, President Clinton signed into law the *ICC Termination Act of 1995*

("ICCTA") abolishing the Interstate Commerce Commission ("ICC") and transferring some of its regulatory functions to the newly created STB. Important for purposes of this petition, the STB is responsible for accepting tariff filings on behalf of water carriers[2] and ensuring that through routes involving water carriers in the noncontiguous domestic trade are reasonable.[3] Moreover, as recognized and provided for by the Jones Act, the STB is responsible for "recognizing" through routes involving the Canadian rail lines.[4] As explained above, the Jones Act exception applies only with respect to movements involving through routes "recognized" by the STB.

These are exactly the issues set forth in this petition. Specifically, Horizon is requesting the STB to declare that the movements at issue are unlawful under the Jones Act exception because the through routes at issue are 1) unreasonable, contrary to the reasonable standard set forth in *49 U.S.C. § 13701* and 2) involve through routes that should not be recognized by the STB. For the reasons explained in detail below, Horizon's request is required by the plain language of the ICCTA and is necessary to protect the domestic shipping industry from unfair practices designed to circumvent the law.

B. A Declaratory Order Is Warranted

A declaratory order is warranted. Under *4 U.S.C. § 554(e)* and *49 U.S.C. § 721*, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. *See e.g. Desertxpress Enterprises, LLC-Petition for Declaratory Order*,

[2] *49 U.S.C. § 13702*
[3] *49 U.S.C. § 13701*
[4] *49 U.S.C. § 55116*

Finance Docket No 34111 (STB Served August 31, 2006) at 3 (Declaratory order proceeding instituted to address whether a project to build a high speed passenger rail system was subject to state and local environmental review) *See also, SMS Rail Service Inc -Petition for Declaratory Order*, Finance Docket No 34483 (STB Served January 24, 2005) at 1 (Declaratory order issued finding that SMS functioned as a rail common carrier) The issues set forth in this petition present a continuing controversy falling squarely within the jurisdiction of the STB Absent declaratory action by the Board, ASC and Sunmar will continue to unlawfully circumvent the Jones Act by using unreasonable through routes that should not be recognized by the STB

II. The Sunmar and ASC Through Routes Are Not Permitted Under the Jones Act.

A. The Movements At Issue Do Not Involve Through Routes Recognized by the STB

The movements addressed by this Petition do not satisfy the plain language of the Jones Act, specifying that the exception applies only to movements involving "through routes" "recognized" by the STB To the best of Horizon's knowledge, the through routes at issue have not been recognized by STB Nor could they be as a matter of law because, as discussed below, they do not meet the reasonableness standard specifically provided for in the ICCTA (*49 U S C §13701)*

It is important to note that the STB has no discretion with respect to this issue If the "through route" is not recognized by the STB, the Jones Act exception cannot apply

It is a fundamental rule of statutory construction that if a statute is "clear on its face" it must be followed. *See for example Consumer Product Safety Commission et al v GTE Sylvania, Inc.* 447 U.S. 102, 108, 64 L.Ed. 2d 766, 772 (1980) ("Absent a clearly expressed legislative intention to the contrary, [the] language [of the statute] must ordinarily be regarded as conclusive"), *Estate of Lloyd Coward v Nicklos Drilling Company*, 505 U.S. 469, 476 120 L. Ed. 2d 379, 389 (1992) (Holding that Coward forfeited his right to benefits by failing to obtain writing approval as required by the plain language of the statute.) Administrative agencies, such as STB, have no power to alter or limit a specific requirement of a statute. *See generally* 2 Am. Jur. 2d Administrative Law § 77, at 99 (1994) ("[I]t is axiomatic that an administrative agency has no power to declare a statute void or otherwise unenforceable.")

There is no ambiguity in the Jones Act. The exception applies only with respect to movements involving through routes "recognized" by the STB and for which rate tariffs have been filed. Here through routes have not and for reasons explained below cannot be "recognized" by the STB. Accordingly, in light of the foregoing and based upon the plain language set forth in the statute, Horizon respectfully requests that the Board issue a declaratory order finding that the subject movements are not recognized by the STB and, therefore, are not lawful under the Jones Act.

B. The Sunmar/ASC Through Routes Do not Meet the Reasonable Standard Set forth in *49 U.S.C. § 13701*

It is important to note that through routes used by Sunmar and ASC may not be recognized by the STB because they do not satisfy the reasonable standard set forth in *49*

U.S.C. § 1370(m)(2) specifying that such routes be reasonable. While the statute does not define "reasonable", its common meaning-"in accordance with reason" must be assumed to apply.[5] For reasons explained below, the through routes subject to this petition are simply "sham movements" designed to circumvent the Jones Act and certainly cannot be characterized as "in accordance with reason".

As the map provided at Attachment 2 demonstrates, the subject movements are nothing more than a ruse to qualify for the Jones Act exception. The goods are first shipped via intermodal carriage from Alaska on a through bill of lading for delivery in Boston and other points in the U.S. The goods arrive by vessel at the Bayside Marine Terminal in New Brunswick, which is only about 6 miles south of St. Stephen, New Brunswick. St. Stephen is just across the St. Croix River from Calais, Maine, which is the U.S. port of entry through which the goods in question enter the U.S. After discharge in New Brunswick, the goods are transported via temperature-controlled trailers and hauled by truck to either McAdam, New Brunswick, or Saint John, New Brunswick for placement on a Canadian rail line. McAdam is approximately 30 miles north of St. Stephen and further away from the ultimate crossing point into the U.S. Similarly, St. John is approximately 50 miles further east of the U.S. port of entry. The only purpose for this commercially meaningless northerly or easterly diversion of the goods away from the ultimate port of entry, i.e. to McAdam or Saint John, both of which are farther away from the U.S. port of entry, is to perpetrate a ruse in an attempt to satisfy the statutory

[5] See Merriam-Webster Dictionary at http://www.m-w.com/cgi-bin/dictionary?reasonable.

requirement that the goods move in part along Canadian rails and is inconsistent with the reasonable standard provided for in *49 U S C § 13701*

C. A Declaratory Order Indicating that the Subject Through Route is Unreasonable is Consistent With Past Precedent

A Declaratory Order finding the subject through route unreasonable is consistent with past precedent Although the issue presented to the board by this petition, the reasonableness of a route for purposes of the Jones Act is one of first impression, the unlawful nature of sham or subterfuge movements is not new The Board's predecessor, the ICC[6], routinely found sham movements designed for purposes of evading jurisdiction of a statute or regulatory body unlawful

In *Hudson Transportation Company v United States,* 219 F Supp 42, (June 14, 1963) (*"Hudson"*) for example, the United States District Court for the District of New Jersey upheld a determination made by the ICC finding that a movement designed to circumvent the Pennsylvania Public Utilities Commission (PPUC) regulatory jurisdiction was not legitimate At issue in *Hudson*, were routes between Pennsylvania origin points and Pennsylvania destination points traversing New Jersey, designed to circumvent PPUC jurisdiction Noting the circuitous nature of the routes at issue the court concluded

---

[6] The STB routinely applies the precedent of the ICC *See CSX Transportation, Incorporated v Transportation Communications International Union,* 480 F 3d 678 (Nov 2007) ("The ICC Termination Act of 1995 abolished the ICC and created the STB The STB then adopted the precedents and regulations of the ICC"), *Arizona Electric Power Corporative Inv v Surface Transportation Board,* 454 F 3d 359, 364 (July 18, 2006) ("The ICC Termination Act of 1995 abolished the ICC, created the STB, transferred the ICC's remaining regulatory authority to it and provided that ICC precedent applies to the STB ")

> The unavoidable conclusion is that the Hudson and Arrow routes involved are not logical and normal operations the use by Hudson and Arrow of their tacked on routes is a deliberate, calculated method to avoid the unfavorable consequences to them of their intrastate Pennsylvania traffic coming within the rightful jurisdiction of the Utility Commission of the Commonwealth evidence overwhelmingly points to those tacked on routes as artificial, contrived arrangements adopted by Hudson and Arrow in order to obtain desirable Pennsylvania intrastate business which would otherwise be unavailable to them The record makes it clear that we are not dealing with bona fide transportation in interstate commerce but with a mystic maze designed solely to escape the control of the Pennsylvania Commission In the full sense of the word, the operations are subterfuges

Hudson at 44, 49 *See also Leonard Express, Inv v United States*, 298 F Supp 556, 560 (April 1969) (Following *Hudson*, the Court concluded that the movements at issue were designed to circumvent PPUC authority noting "[t]he Commission was warranted in concluded that to permit such operations would illegally impinge upon the Commonwealth of Pennsylvania's exclusive jurisdiction over intrastate shipments "), *See also Service Trucking Company v United States*, 239 F Supp 519, 521, 522 (The "only purpose in routing shipments via Bridgeville, Delaware is to attempt to make legal, by converting into interstate shipments in intrastate commerce for which Service lacks authority from the Public Service Commission of Maryland ")

The movement subject to this petition is similar to that considered by *Hudson* in that it was designed for no purpose other than to permit Sunmar and ASC to qualify for a legal exemption that it was otherwise not qualified to receive The movement at issue is nonsensical from a business point of view as it in no way forwards the movement of goods The goods travel in a circuitous route After their voyage via vessel arriving at

the Bayside Maine Terminal, which is roughly 6 miles from the port of entry (Calais Maine), the goods are hauled in a triangular pattern traversing approximately 145 miles (*see* description of route *supra* at pp 2-3 and Attachment 2) back to St Stephen/Calais port of entry) We urge the STB to follow analogous precedent set forth by the ICC and courts and conclude that these same movements are unlawful for purposes of the Jones Act Not only is such a finding warranted by past precedent, but is necessary to preserve the special protections the Jones Act is intended to provide to the domestic shipping industry

III. The Sunmar and ASC Trough Routes Are Inconsistent With the Transportation Policy

Sunmar/ASC through routes, designed solely to circumvent the Jones Act, are inconsistent with the United States Transportation Policy set forth in *49 U S C § 13101* Similar to the goals of the Jones Act, *Section 13101* recognizes the need to protect the transportation system so that it continues to meet the needs of the United States, including with respect to national defense *Section 13101* further recognizes the need to preserve the inherent advantage of each mode of transportation and to encourage sound economic conditions

The practices of Sunmar and ASC are inconsistent with these policies Horizon and other Jones Act qualified shippers, face economic hardship by having to compete with non-U S carriers who attempt to qualify for a Jones Act exception only because

they have created sham movements that are in no way related to furthering the movement of the goods

Conclusion

In light of the foregoing, Horizon respectfully requests that the Board issue a Declaratory Order declaring the movement's described above in violation of the Jones Act because they are unreasonable and, therefore, do not occur over a through route that is "recognized" by the Board Should you have questions or require additional information please do not hesitate to contact the undersigned

Respectfully Submitted,

By _____

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By _____

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ATTACHMENT 1

1

HQ **115446**

August 9, 2001

VES-3-17-RR II EC 115446 GFV

CATEGORY Carriers

William N Mynre, Esq

Preston Gates Ellis & Rouvelas Meeds LLP

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Washington, D C 20006-5209

RE Coastwise Trade, Third Proviso to 46 U S C App 883

Dear Mr Mynre

This is in response to your letter dated August-1, 2001, on behalf of Sunmar Shipping, Inc ("Sunmar"), requesting an expedited ruling regarding the proposed transportation of frozen fish between a coastwise point in Alaska and another coastwise point in the continental United States to be accomplished in part by non-coastwise-qualified vessels and in part over Canadian rail lines You request expedited treatment of your request pursuant to 177 2(d), Customs Regulations (19 CFR 177 2(d) in view of the fact that the cargoes in question are currently scheduled to be shipped on or about August 15, 2001 Our ruling in this matter is set forth below

FACTS

Sunmar is an ocean carrier engaged in the transportation of cargoes between points in the United States, Canada, Northern Europe, and Russia The transportation currently under consideration involves the shipment of frozen fish products from fishing vessels and shore plants in the Dutch Harbor, Alaska area on foreign-flag, non-coastwise-qualified vessels and then by intermodal carriage via the New Brunswick Southern Railway ("NBS Railway"), a Canadian rail line, for ultimate delivery, via a through bill of lading, to cold storage facilities in Boston or Gloucester

and other points in the United States

Sunmar will charter foreign-flag, non-coastwise-qualified vessels from foreign owners (the "Vessels") The products loaded onto the Vessels in the Dutch Harbor area will be unitized for intermodal carriage and handling under the through bill of lading The Vessels will then move the cargo from Dutch Harbor to New Brunswick, Canada

When the Vessels arrive in New Brunswick, Canada, the products will be discharged to the Bayside Food Terminal near Bayside, New Brunswick, where they will be staged for intermodal carriage At the Bayside terminal, the products will be transferred into intermodal reefer trailers The loaded trailers will be hauled by truck to either McAdam, New Brunswick or Saint John New Brunswick, where the trailers will be loaded onto rail flat cars

The rail cars will then be moved by the NBS Railway over rail trackage in Canada, either from McAdam to Saint John, or Saint John to McAdam At either of these rail-truck transfer facilities, the NBS Railway truck trailers will be offloaded and then driven from there into the United States via the St Stephen, New Brunswick/Calais, Maine, border crossing After entry, the trailers will be trucked to a cold storage facility in the United States Sunmar will be documented as the shipper, while each respective customer is the consignee and the Canadian rail carrier will be NBS Railway

The merchandise to be transported under this proposal consists of various fish products, including by not limited to frozen pollock fillets, minced pollock, headed and gutted pollock, headed and gutted cod, cod fillets, salted cod, or hake fillets taken from North Pacific fisheries that are processed, frozen, and packaged either on shore or on board catcher processors operated by Glacier Fish Company and other operators All products moving under the proposed transportation will be picked up directly from the catcher processor vessel, at a shore based plant, or transshipped to Dutch Harbor, Alaska, for loading onto one of the Vessels The Interstate Commerce Commission ("ICC"), the predecessor agency to the Surface Transportation Board ("STB"), exempted from regulation the rail transportation of "frozen processed fish or seafood (STCC 20-361" in 1983 Exemption From Regulation—Rail Transportation—Frozen Food, Ex Parte No 346 (Sub-No 15), 367 I C C 859 (Nov 30, 1983) Thus, since then, this commodity/traffic has not been subject to the rate tariff filing requirement at the ICC and its successor, the STB

ISSUE

Whether the transportation of frozen fish indirectly between coastwise points, in part via both foreign-flag vessel and rail trackage in Canada, as described above, is in accord with the Third Proviso to 46 U S C App 883

1

LAW AND ANALYSIS

Title 46, United States Code Appendix, 883 (46 U S C App 883, the coastwise merchandise statute, often called the "Jones Act"), provides in pertinent part that no merchandise shall be transported between points embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any vessel other than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States (i e , a coastwise-qualified vessel)

The Third Proviso to 46 U S C App 883 provides that

[T]his section shall not apply to merchandise transported

between points within the continental United States,

including Alaska, over through routes heretofore or

hereafter recognized by the Surface Transportation Board
for which routes rate tariffs have been or shall hereafter be

filed with the Board when such routes are in part over

Canadian rail lines and their own or other connecting
water facilities

Simply stated, the prohibition against using a non-coastwise-qualified vessel set forth in 883 would not apply if all of the conditions to the Third Proviso are met, that is
a) through routes are utilized which have heretofore or

are hereafter recognized by the STB,
b) routes rate tariffs have been or shall hereafter be filed

with the STB, and have not subsequently been rejected
for filing, have become effective according to their terms,
and have not been subsequently suspended, or withdrawn

by the STB, and

c) the routes utilized are in part over Canadian rail lines and
their own or other connecting water facilities

The Customs Service has held that "over Canadian rail lines" means over rail trackage in

Canada, and that "their own or other connecting water facilities" means water facilities covered by a through route regardless of whether those facilities connect directly with the Canadian rail line covered by that through route (See, e g , Headquarters ruling letter 113141), dated June 29, 1994)

On December 29, 1995, Congress passed the Interstate Commerce Commission Termination Act ("ICC TA") This legislation, which was effective January 1, 1996, abolished the ICC, the predecessor agency to the STB (see 2 and 101, Pub L 104-88) and although it did provide conforming amendments to several sections of the Merchant Marine Act of 1920 (see 321, Pub L 104-88), nothing in the remainder of the statute or its legislative history specifically addresses the ramifications of the aforementioned abolition on the administration of the Jones Act (27 of the Merchant Marine Act of 1920, as amended), including the Third Proviso However, our review of the legislation in its entirety does yield guidance with respect to this issue Specifically, we find the following sections of the legislation instructive in this matter

Section 201 of Pub L 104-88 amended title 49 of the United States Code by adding a new Chapter 7 establishing the STB within the Department of Transportation (201(a), Pub L 104-88, citing 49 U S C 701) This statutory amendment provides as follows

Except as otherwise provided in the ICC Termination Act

of 1995, or the amendments made thereby, the Board
shall perform all functions that, immediately before the

effective date of such Act, were functions of the Interstate Commerce Commission or were performed by any officer or employee of the Interstate Commerce Commission in the capacity as such officer or employee (210(a), Pub L

104-88, citing 49 U S C 702)

Accordingly, there exists unequivocal statutory authority for the premise that notwithstanding the demise of the ICC, those matters within its jurisdiction that were not subsequently eliminated by the ICCTA or the amendments made thereby (e g , Third Proviso-dependent authorization) are now vested in the STB

In regard to Third Proviso ruling requests to be considered by Customs subsequent to the effective date of the ICCTA, we note that pursuant to 204(a)(2) of the ICCTA, the Board published a final rule

in the Federal Register on June 7, 1996 which removed from the Code of Federal Regulations obsolete ICC regulations, including the rail tariff filing requirement (61 FR 29036) On July 5, 1996, the STB published in the Federal Register as a final rule its new regulations (49 CFR Part 1300, effective August 4, 1996), which require rail carriers to merely disclose their rates and

service terms to any person upon formal request, as well as provide advance notice of increases in such rates or a change in such service terms (61 FR 35139) Notwithstanding the substitution of ICC authorization with the aforementioned STB oversight, the ICCTA is devoid of any indicia that this new regulatory authority should be interpreted other than in pari materia with the Third Proviso

It is therefore our position that notwithstanding the abolition of the ICC and the failure on the part of the ICCTA to specifically provide for conforming amendments to the Jones Act, the cumulative effect of the ICCTA nonetheless mandates that the Third Proviso remains in force albeit subject to compliance with the requirements of the STB Further in this regard, however, we note Customs ruling letter 112085 , dated March 10, 1992, issued prior to the ICCTA, wherein we held

that the legality of a proposed movement of frozen seafood pursuant to the Third Proviso was not thwarted merely because the language therein provides for the filing of a rate tariff and such merchandise was a commodity for which no rate tariff was required under ICC procedures The rationale for this position was that, " although the statute specifies the filing of rate tariffs with the Interstate Commerce

Commission, mechanistic adherence to that requirement in the present climate of deregulation would lead to an absurd result which cannot be justified " Id We believe the same such result would occur were we to disallow the proposed movement under consideration where, as discussed above, the rail tariff filing requirement has been removed pursuant to the regulations of the STB promulgated pursuant to the ICCTA

Accordingly, the indirect transportation between coastwise points of commodities which are exempt from requirements regarding rate tariffs, through the utilization of foreign-flag vessels and Canadian rail trackage, is not prohibited merely because no tariffs may be filed to cover the movements

In this regard we note that Customs has previously ruled that transportation scenarios nearly identical to the one currently under consideration did not violate the Third Proviso (See Customs ruling letters 114407 , dated July 23, 1998, and 115124 , dated August 11,

2000) We reach the same conclusion in this case inasmuch the transportation between coastwise points "either directly or via a foreign port" in non-coastwise-qualified vessels is within the purview of 46 U S C App 883 pursuant to the express language of that statute. The Third Proviso simply permits transportation between two coastwise points that would otherwise be prohibited by that statute when such transportation is on a through route recognized, or exempted by, the STB and is in part over Canadian rail lines

HOLDING

1

The transportation of frozen fish indirectly between coastwise points, in part via both foreign-flag vessel and rail trackage in Canada, as described above, is in accord with the Third Proviso to 46 U S C App 883

Sincerely,

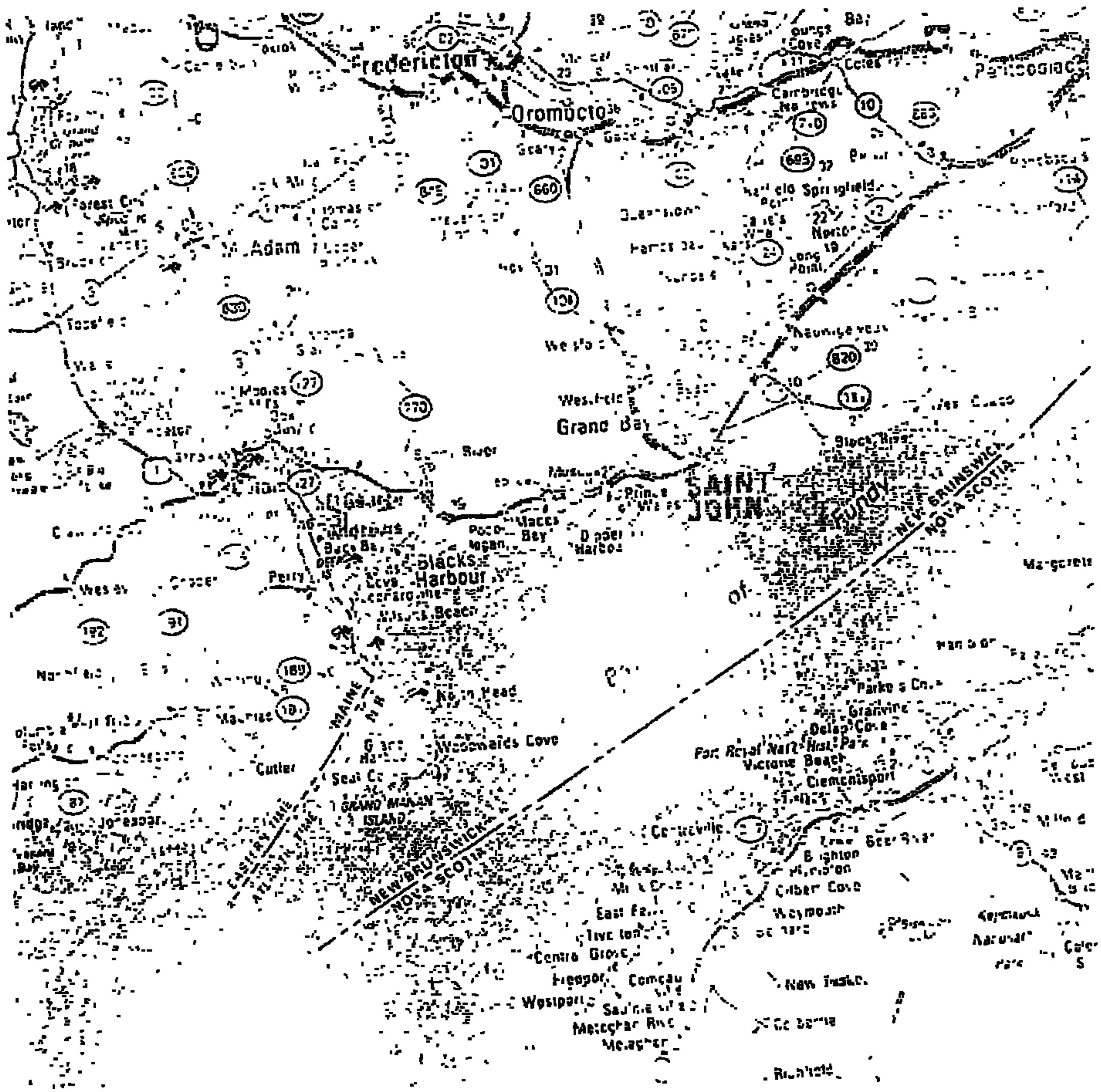
Larry L Burton

Chief

Entry Procedures and Carriers Branch

ATTACHMENT 2

(full color)



Fredericton
Oromocto
Saint John
Grand Bay
Blacks Harbour
St. Andrews
McAdam
Springfield
Grand Manan Island
North Head
New Brunswick
Nova Scotia
Maine
Port Royal Nat'l Hist. Park
Clementsport
Granville
Digby
Weymouth
Westport
Meteghan River
Cutler

ATTACHMENT 3

U.S. CUSTOMS AND BORDER PROTECTION
Department of Homeland Security
1300 Pennsylvania Avenue, N W , Washington, D.C. 20229

JAN 21 2004

VES-3-17 RR:IT:EC
116021 CK

Mr. Myles J. Ambrose
Mr. Ronald Gerdes
Mr. David Cohen
Sandler, Travis & Rosenberg, P.A.
1300 Pennsylvania Ave, N.W.
Washington, DC 20004-3002

RE: Request to revoke/modify CBP Headquarters Ruling Letter (HRL) 115446, Third Proviso to 46 U S.C App §883

Dear Sirs,

This is in response to your letter dated July 21, 2003 on behalf of your client, Horizon Lines, LLC. We further note that you made various additional submissions after your initial letter in conjunction with a meeting we held at your request on September 4, 2003. You request that U S. Customs and Border Protection (CBP) modify/revoke Headquarters Ruling Letter (HRL) 115446, dated August 9, 2001 As you know, HRL 115446 was issued to Sunmar Shipping, Inc.,("Sunmar") and involved the transportation of frozen fish products from fishing vessels and shore plants in Dutch Harbor, Alaska on chartered foreign-flag vessels and then by intermodal carriage via the New Brunswick Southern Railway ("NBS Railway"), a Canadian rail line, for ultimate delivery, via a through bill of lading, to cold storage facilities in Boston or Gloucester and other points in the United States. We held that such transportation of the frozen fish indirectly between coastwise points, in part via both chartered foreign-flag vessels and Canadian rail, is in accord with the Third Proviso to 46 U S.C. App §883 (hereinafter "Third Proviso").

You contend that HRL 115446 should be revoked/modified because the movement described therein fails to comply with the requirements of the Third Proviso, for the following reasons. First, you state that Sunmar failed to comply with the Third Proviso's tariff-filing requirements. Second, you state that regardless of the tariff-filing requirements, the route utilized by Sunmar is commercially absurd and a purposeless diversion from the "through" or "direct" route the Third Proviso also requires

The determinative facts quoted from HRL 115446 are as follows:

> Sunmar will charter foreign-flag non-coastwise-qualified vessels from foreign owners (the "Vessels"). The products loaded onto the Vessels in the Dutch Harbor area will be unitized for intermodal carriage and handling under the through bill of lading. The Vessels will then move the cargo from Dutch Harbor to New Brunswick, Canada.
>
> When the Vessels arrive in New Brunswick, Canada, the products will be discharged to the Bayside Food Terminal near Bayside, New Brunswick, where they will be staged for intermodal carriage. At the Bayside terminal, the products will be transferred into intermodal reefer trailers. The loaded trailers will be hauled by truck to either McAdam, New Brunswick or Saint John, New Brunswick, where the trailers will be loaded onto rail flat cars.
>
> The rail cars will then be moved by the NBS Railway over rail trackage in Canada, either from McAdam to Saint John, or Saint John to McAdam. At either of these rail-truck transfer facilities, the NBS Railway truck trailers will be offloaded and then driven from there into the United States via the St. Stephen, New Brunswick/Calais, Maine, border crossing. After entry, the trailers will be trucked to a cold storage facility in the United States. Sunmar will be documented as the shipper, while each respective customer is the consignee and the Canadian rail carrier will be NSB Railway.

Title 46, United States Code Appendix, § 883 (46 U.S.C. App. §883, the merchandise coastwise law often called the "Jones Act") prohibits the transportation of merchandise between United States coastwise points, either directly or via a foreign port, or for any part of the transportation, in any vessel other than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States (i.e., a coastwise-qualified vessel).

The "Jones Act" contains several exceptions to the general prohibition against the transportation of merchandise in coastwise trade by non-qualified vessels, including what is known as the Third Proviso. The Third Proviso provides that:

> [T]his section shall not apply to merchandise transported between points within the continental United States, including Alaska, over through routes heretofore or hereafter recognized by the Surface Transportation Board for which routes rate tariffs

> have been or shall hereafter be filed with the Board when such routes are in part over Canadian rail lines and their own or other connecting water facilities

46 U.S C App §883.

In light of your first argument regarding Sunmar's failure to comply with the Third Proviso's rate tariff filing requirements, we sent a written request for an opinion on this issue to the Secretary, Surface Transportation Board (STB) on September 24, 2003 By letter dated December 4, 2003, we received an "Informal Opinion on the filings of 'Routes Rates Tariffs' as described in 46 U S C. App. 883" from the Director, Office of Compliance and Enforcement, STB The aforementioned opinion provides in pertinent part, as follows.

> Although such water carriers must file tariffs with the STB, no tariffs are currently being filed with the STB or have been filed with the STB bearing the description 'routes rates tariffs' that is used in the 'Third Proviso' of the Jones Act. Tariffs filed with the STB are rate tariffs but are not route-specific. Thus, the tariff rate applies to the movement between the origin and destination without regard to the route taken . .
>
> . . .
>
> In my informal opinion, which is not binding on the Board, the statute continues to provide for the filing of tariffs by water carriers operating in the U.S noncontiguous domestic trade Thus, notwithstanding the regulatory exemptions issued by the Board's predecessor, the ICC, or the statutory changes repealing the tariff filing requirements for rail and most motor carrier operations in interstate commerce, water carriers are required to file, and do file, non-route-specific tariffs for their operations in the U S noncontiguous domestic trade

However, in regard to the specific facts presented in HRL 115446, which involved the chartering of foreign-flagged vessels, it is noteworthy that this STB opinion provided:

> This requirement that water carriers file tariffs with the Board applies only to such carriers who are common carriers, meaning that they are carriers that hold out their services to the public generally, and does not apply to private carriage.

> Finally, I should note that in the ruling you provided with your letter Sunmar is described as the shipper using chartered vessels Therefore Sunmar's operations could be considered private carriage and non-jurisdictional to the STB for tariff filing purposes. (Emphasis added)

Hence, we agree with your assertion, in accordance with the above opinion of the STB, that when a non-coastwise-qualified vessel is used to move merchandise in the noncontiguous domestic trade and in part over a Canadian rail line in order to utilize the exemption to the "Jones Act" as provided in the Third Proviso, rate tariffs should be filed with STB, only for informational purposes However, as the STB opinion clearly states, since the facts in HRL 115446 indicate that Sunmar is using chartered foreign-flagged vessels, which are private carriage, Sunmar's operations are not within the jurisdiction of the STB. Sunmar, utilizing private carriage, cannot file rate tariffs with the STB for any purpose, even informational Thus, in HRL 115446 it was not possible for Sunmar to comply with the rate tariff filing requirements in the Third Proviso

The inability of Sunmar to comply with STB filing requirements because private carriage is outside the jurisdiction of the STB should not result in a de facto exclusion of all chartered non-coastwise-qualified vessels from transporting merchandise coastwise in compliance with those remaining requirements of the Third Proviso. Such exclusion would be tantamount to administratively repealing the Third Proviso for all chartered vessels. Although the statute specifies the filing of tariffs with the STB, mechanistic adherence to that requirement for private carriage which is not within the jurisdiction of the STB is unjustified. Thus, the only reading that gives full effect to the Third Proviso for all vessels is that non-chartered non-coastwise-qualified, or in other words vessels that are public (i.e common) carriers, are required to file rate tariffs with the STB, even if only for informational purposes, and chartered vessels (i.e., private carriers) are thus exempted from such filing.

This interpretation was first applied in HRL 112085, dated March 10, 1992, when the ICC designated frozen seafood as an exempt commodity for which no rate tariff is required under agency procedures In that ruling we stated, "although the statute specifies the filing of rate tariffs with the Interstate Commerce Commission, mechanistic adherence to that requirement in the present climate of deregulation would leave to an absurd result which cannot be justified."

In HRL 114407, dated July 23, 1998, when discussing the abolition of the ICC and the abolition of filing requirements for rail, we stated that although the legislation terminating the ICC did not address the ramifications of the aforementioned abolition on the administration of the Jones Act, there was no indicia that the new regulatory authority should be interpreted other than in pari materia with the Third Proviso Thus, our conclusion that private carriage, which is not within the jurisdiction of the STB, is not precluded from utilizing the Third

Proviso because it may not file its rates with the STB is consistent with our previous interpretations of the Third Proviso

Your second argument is that the route utilized by Sunmar is commercially absurd and a purposeless diversion from the "through" or "direct" route required by the Third Proviso We note that the Third Proviso does not state a "direct" route should be used, it instead uses the term "through" route in part over Canadian rail lines. We have long held that "in part over Canadian rail lines" is any use of Canadian rail The Third Proviso does not have a de minimus requirement for "in part over Canadian rail lines," nor has CBP in the last twenty years read such a de minimus requirement into the statute " See, HRL 105604, dated April 30, 1982, HRL 111987, December 2, 1991, HRL 112085, March 10, 1992; HRL 113141, dated June 29,1994, HRL 113365, dated March 10, 1995, HRL 114407, dated July 23, 1998, and HRL 115124, dated August 11, 2000. Furthermore, the clause in the Third Proviso requiring "through routes" recognized by the STB must be read in conjunction with the clause "for which routes rate tariffs have been or shall hereafter be filed " Therefore, based on the above-discussion, private carriage, which is not within the jurisdiction of the STB and for which rate tariffs cannot be filed, is not confined to any "through" route recognized by the STB in order to utilize the Third Proviso

Based on the above analysis we do not agree that HRL 115446 should be either modified or revoked as contrary to law or policy HRL 115446 is consistent with the policy established over the last twenty years of CBP's administration of the "Jones Act" and the Third Proviso. However, we do agree that parties are bound to use Canadian rail lines in order to avail themselves of the Third Proviso. A party that fails to utilize Canadian rail lines, while ostensibly operating pursuant to the Third Proviso, is in violation of the "Jones Act." It is our policy to refer allegations of violations of the "Jones Act" to the Bureau of Immigration and Customs Enforcement (ICE) for investigation. Please be assured that if ICE provides us with evidence that Sunmar has failed to utilize Canadian rail lines in the movement of the frozen fish discussed in HRL 115446, we will take appropriate action.

Sincerely,

Glen E. Vereb

Glen E. Vereb
Chief
Entry Procedures and Carriers Branch

ATTACHMENT 4

U S Department of Homeland Security
Washington DC 20229

APR 27 200

U S Customs and Border Protection

VES-3-17-OT·RR·BSTC.CCI
H009796 GG

Mr David E Cohen
Sandler, Travis & Rosenberg, P.A
1300 Pennsylvania Avenue, NW
Washington, D C 20004-3002

Dear Mr Cohen

Reference is made to your correspondence of April 4, 2007, in furtherance of your correspondence of February 13, 2007, on behalf of your client, Horizon Lines LLC, concerning the decision of the U S. Federal District Court for the District of Columbia in Horizon Lines LLC v United States (Horizon Lines) * You reiterate your request that in view of the recent dismissal of the case on appeal, Customs and Border Protection (CBP) now take steps to carry out the order of the district court remanding the case to CBP for further proceedings consistent with the court's opinion

As stated in our letter to you of March 26, 2007, we are cognizant of the fact that in Horizon Lines the court ruled that a water carrier in the noncontiguous domestic trade had to have a rate tariff on file with the Surface Transportation Board (STB) in order to transport merchandise in a non-coastwise-qualified vessel over the waterborne portion of a through route that included Canadian rail lines, as described in the Third Proviso to former 46 U S C. App 883 (the Jones Act). (The Third Proviso to former section 883 has been recodified at 46 U S.C. 55116, pursuant to Pub. L. 109-304 (October 6, 2006)) In ruling as it did, the court overturned CBP's position in the case, as set forth in various agency decisions, such as those that were before the court involving Sunmar, Inc (HQ 116446 (August 9, 2001), HQ 116021 (January 21, 2004), and HQ 116185 (March 28, 2005))

We note the correctness of the court's decision was further evidenced by the subsequent filing of a rate tariff by American Seafoods Company LLC with the STB, and that agency's acceptance of such filing As a consequence of that acceptance, CBP voluntarily requested the dismissal of its appeal inasmuch as it is abundantly clear that, contrary to our position as set forth in the above-cited rulings, compliance with the conditions of section 55116 is possible. Therefore, in response to the remand order of the court, CBP henceforth will require that a water carrier operating in the noncontiguous domestic trade have a rate tariff on file with the STB for any through route (coastwise transportation) described in section 55116, in order for the water carrier to lawfully employ a non-

* (414 F Supp 2d 46 (D. D C February 10, 2006), motion to alter or amend judgment denied, 429 F Supp 2d 92 (D D C April 14, 2006), appeal dismissed, 2007 U S. App LEXIS 1401 (D C Cir January 22, 2007))

coastwise-qualified vessel in transporting merchandise over such route Moreover, to the extent any ruling conflicts with the court's decision, CBP will abide by the court's decision Finally, as to your concern that others may rely on rulings invalidated by the court, we believe that the court's decision constitutes public notice that the rulings were invalidated by the court

In addition, you request that CBP consult with the STB and include in its ruling letters "an analysis of the reasonableness of any proposed route under the Third Proviso in order to ensure that both the spirit and the letter of the Jones Act is [sic] carried out." You further state in this respect that:

> While the district court did not address this issue, nothing prevents Customs from implementing new regulations requiring proposed routes to be reviewed to evaluate their 'commercial soundness'.

Emphasis added. However, action in concert with your foregoing request would clearly not be in order Contrary to your belief, the court in Horizon Lines did address, and categorically rejected, the requirement that CBP examine and approve the commercial soundness of any proposed route under the Third Proviso (recodified at 46 U S.C 55116, as noted above) To this end, as the district court observed and concluded:

> Plaintiff [Horizon Lines] also argues that the Third Proviso contains an implied prohibition on "'sham or commercially impractical Canadian rail movement to achieve 'technical compliance' with the literal terms of the statute'". [However] [p]laintiff can point to no case in which the intent of the shipper, other than to transport goods according to the route described, was relevant to the determination of whether a through route existed If Congress wishes to limit the use of the Third Proviso to specific routes or to require the STB to evaluate the commercial soundness of a proposed route, it has the authority to do so, but the Third Proviso as currently written contains no such requirement

414 F Supp 2d, at 55 n.6 (emphasis added). Hence, inasmuch as the court found in Horizon Lines that there was no requirement to evaluate the commercial soundness of any route employed under the Third Proviso (46 U S C. 55116, as recodified), and given CBP's lack of expertise to conduct such an analysis, CBP at this time does not believe it necessary or appropriate to amend the regulations to impose such a requirement thereunder.

Sincerely,

Glen E Vereb

Glen E Vereb
Chief
Cargo Security, Carriers, & Immigration Branch

CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached document was served via first class mail on the following

Michael K Tomenga
Counsel to American Seafoods, LLC
NEVILLE PETERSON LLP
1900 M Street NW, Suite 850
Washington, DC 20036

August 15, 2007

David Cohen